Supreme Court, U.S.
FILED

931859 APR 28 1994

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Application No. ___

IN THE

Supreme Court Of The United States

OCTOBER TERM 1993

HERBERT MEISLER,
Petitioner

vs.

GANNETT COMPANY, INC.,
Respondent

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT MEISLER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	91-0687-AH-M
	)	
GANNETT COMPANY, INC.; ET AL.,	)	
	)	
Defendants.	)	
	)	

ORDER

This cause is before the Court on the motion for summary judgment filed by Defendants Gannett Company, Inc. ("Gannett") and USA Today. [Doc. 12]. For the reasons that follow, Defendants' motion for summary judgment is GRANTED.

FINDINGS OF FACT

In 1989, four Alabamians, including plaintiff Herbert Meisler, formed the American Racing Group ("ARG"), and obtained, along with other investors, a license to operate the Dairyland Greyhound Park ("the park") in Kenosha, Wisconsin.[1] The park opened in June, 1990,

[1] The other Alabamians were Eliot and Herman Maisel, and Harold Ripps. Ripps has instituted a libel action based on identical facts currently pending in the Northern District of Alabama before district judge Blackburn.

but one month later, the Wisconsin Racing Board ("the board") filed a petition seeking disciplinary action against the park. A press release issued by the board stated that the petition alleged that "certain individuals had committed illegal acts of fraud, deception and coercion for financial gain and to halt board investigations." Plaintiff was charged particularly with threatening certain investors not to cooperate with the board investigations, and as a member of ARG, of conspiring to receive kickbacks in real estate brokerage fees received from the park. The majority of the charges, however, involved other members of the ARG. A hearing was scheduled for December 20, 1990. The disciplinary action generated a great deal of publicity and published commentary during 1990.

At the hearing, the board announced a settlement with the four Alabamians, which the Alabamians, including Plaintiff, had accepted. The settlement included imposition of a forfeiture of $1 million and costs totalling $150,000.00. The board also noted that there would be "complete and total divestiture of all culpable individuals in this matter; both Eliot Maisel and Herman Maisel have tendered their stock certificates to an escrow account". ARG would be dissolved and cease operations in Wisconsin. The four Alabamians would cease to participate in the kennel booking process at the park, and would resign as officers of the park. The board then stated that "Eliot Maisel [(one of the Alabamians)] agrees to divest himself of all ownership interest in" the park. The board then proceeded to approve and sign a settlement agreement and consent decree.

The settlement agreement and consent decree clarified the action of the board vis-a-vis the four Alabamians. The settlement provided that the park, not the Plaintiff, would pay a $1 million forfeiture. The consent order specifically stated that no fines or forfeitures were imposed

on the Plaintiff. The settlement agreement provided that Plaintiff and Ripps (one of the Alabamians) would purchase the stock of the other two Alabamians, and prohibited the latter two, but not the Plaintiff, from becoming officers or directors at the park in the future.

On December 20, 1990, writer Larry Davis of Defendant USA Today wrote a short description of the board action ("the article") that was published in the December 21, 1990 edition of USA Today. The article noted that the board *"removed 4 controversial Alabama investors from track ownership, ordered 4 to pay state $1 million as part of settlement of state racing board violations this year"*. [emphasis supplied]. The article was based on either an Associated Press wire Davis had received just after the settlement was announced or upon information on the settlement provided by John Baas, a Wisconsin "stringer", or on both.[2] The wire stated that the settlement removed the park's Alabama investors, and that they would pay Wisconsin $1.5 million as settlement. The wire clearly bore the messages "URGENT" and "MORE" at the beginning and end of the document, respectively. Defendants knew that a wire bearing such notations might be followed by subsequent wires that might change the initial story. Davis, however, had no knowledge at the time he wrote the article that it contained incorrect information.[3]

The Associated Press also prepared a follow-up wire that clarified the erroneous statements in the first wire. The first wire was dispatched at 4:49 P.M., and the second wire was dispatched at 5:21 P.M. Defendants re-

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[2] Neither Davis nor Baas can positively remember speaking via the telephone on December 20, though they both acknowledge it was a possibility.

[3] Davis deposition at 140.

ceived the second wire at some point after Davis had already written and submitted the article for publication.[4]

On December 21, 1990 lawyers for the Plaintiff claimed the article was false, and demanded an immediate retraction in a prominent position in USA Today. On December 28, 1990 USA Today published a correction stating, under the by-line "CORRECTION", that the board had "barred 4 Alabama investors from [the park's] management, but did not order all 4 to give up their ownership shares. Dairyland — not 4 investors — agreed to pay state $1 million".

CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[5]

"A factual dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is 'material' if it might affect the

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[4] Defendants have moved to strike certain evidence, including the second Associated Press wire, on the grounds that Plaintiff has failed to show that they received the wire, though Defendant admits that they subscribed to the wire services. The Court DENIES the motion to strike as inappropriate on a motion for summary judgment, but further notes that Defendants have admitted that "other things came across the wire later that day". Deposition of Larry Davis at page 84. Accordingly, the motion to strike is also due to be denied on that basis.

[5] Fed.R.Civ.P. 56(c).

outcome of the suit under the governing substantive law."[6]

The basic issue before the Court on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.[7] "[T]he moving party has the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodge[s]", and all factual inferences arising from it, must be viewed in the light most favorable to the nonmoving party.[8] Where the nonmoving party, as here, bears the burden of proof at trial, the burden on the moving party may be discharged by 'showing' — that is, by pointing out to the District Court — that there is an absence of evidence to support the nonmoving party's case.[9]

Once the movant satisfies its initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmovant to "come forward with specific facts showing that there is a genuine issue for trial."[10] Otherwise stated, the nonmovant must "demonstrate that there is indeed a material issue of fact that precludes summary judgment."[11] "A mere 'scintilla' of evidence supporting the [nonmoving]

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[6] *Beck v. Somerset Technologies, Inc.*, 882 F.2d 993, 996 (5th Cir. 1989) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[7] *Anderson, supra*, 477 U.S. at 251-252.

[8] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989).

[9] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[10] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (*quoting* Fed.R.Civ.P. 56(e)) (emphasis removed) (internal quotation marks omitted).

[11] *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The shifting burden from movant to nonmovant at summary judgment described above applies regardless of which party will bear the burden of proof at trial. Id. at 607.

party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party".[12] "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial."[13] The moving party is likewise entitled to judgment as a matter of law when the nonmoving party fails to show sufficiently an essential element of the case as to which the nonmoving party has the burden of proof.[14]

Resolution of this motion depends on whether a rational trier of fact could find that Defendants published the article with actual malice as defined by *New York Times Co. v. Sullivan*[15] and its progeny. At issue are two factually erroneous statements in the December 21, 1990 issue of USA Today: first, that Plaintiff was removed from Dairyland's ownership, and second, that the Wisconsin Racing Board had ordered Plaintiff to pay one million dollars as part of the "settlement of state racing board violations". Both of these assertions were corrected in the December 28, 1992 issue of USA Today.

The First Amendment requires a libel plaintiff to show that in publishing a defamatory statement the defendant acted with actual malice, that is, with "knowledge that it was false or with reckless disregard of whether it was false or not."[16] Such actual malice must be shown with "convincing clarity".[17] These requirements apply to libel actions brought by public figures.[18]

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[12] *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

[13] *Matsushita, supra*, 475 U.S. at 587 (citation omitted).

[14] *Peppers, supra*, 887 F.2d at 1497; *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 636 (11th Cir. 1991).

[15] 376 U.S. 254 (1964).

[16] *Id.* at 279-280.

[17] *Id.* at 285-86.

[18] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Here, Plaintiff argues that Defendants, in publishing "a news item based on an incomplete AP wire, knowing that subsequent wires could change the news report", published the article at issue in this action with reckless disregard for its truth. Plaintiff admits, for purposes of this motion, that he is a "limited public figure".[19]

The Supreme Court has held that "reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[20] Actual malice will also exist where a defendant publishes the false statement "with a high degree of [actual] awareness of probable falsity".[21] A public figure plaintiff must prove more than an extreme departure from professional standards in order to establish actual malice.[22] A jury may find recklessness "where there are obvious reasons to doubt the veracity of the" information relied upon.[23] In determining whether a statement is published with actual malice, the Court's primary focus must be on the publisher's subjective belief in the truth or falsity of the statement.[24]

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[19] *Silvester v. American Broadcasting Companies, Inc.* 839 F.2d 1491, 1494 (11th Cir. 1988).

[20] *St. Amant v. Thompson*, 390 U.S. 727, 713 (1968).

[21] *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667 (1989) (*quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ___, ___, 111 S.Ct. 2419, 2429 (1991). *See also Harte-Hanks, supra*, 491 U.S. at 688.

[22] *See id.* at 665.

[23] *St. Amant, supra*, 390 U.S. at 732; *see generally Pemberton v. Birmingham News Co.*, 482 So.2d 257 (Ala. 1985) for an application of the *St. Amant* standards in a defamation action arising under Alabama law.

[24] *Harte-Hanks, supra*, 491 U.S. at 688; *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 757 (1990);

On a motion for summary judgment, the determination of whether a given material factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. Where the factual dispute concerns actual malice, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not".[25]

The Court concludes that Defendants have met their burden of showing that there is an absence of evidence to support Plaintiff's case. Indeed, the record contains not a shred of evidence indicating that Defendants in fact entertained serious doubt as to the truth of the article in question. Nor did Defendants possess a high degree of awareness of its probable falsity. Larry Davis did not know or believe the article was false at the time of publication, nor were there obvious reasons to doubt the veracity of his sources, including the Associated Press wire. It is true that the initial wire indicated that a follow-up wire should be expected, but that did not mean that the information in the initial wire was false, nor did it indicate that the information in the initial wire was dubious or untrustworthy.

Moreover, Plaintiff's response fails to come forward with specific facts showing there is a genuine issue for trial. The evidence in the record simply cannot support a reasonable jury finding that Plaintiff could show actual malice by clear and convincing evidence.[26]

Clyburn v. News World Communications, Inc. 705 F.Supp. 635 (D.D.C. 1989), *aff'd*, 903 F.2d 29 (D.C.Cir. 1990).

[25] *Anderson, supra*, 477 U.S. at 255-56 (footnote omitted).

[26] *Anderson, supra*, 477 U.S. at 255-56 (footnote omitted); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

The Court understands Plaintiff's main argument to be that Defendants' failure to read subsequent AP wires which altered the news story constituted a gross deviation from standard publishing practices. However, the Supreme Court dispatched this argument in *Harte-Hanks, supra.*[27] As the Supreme Court stated in *Harte-Hanks, supra,* "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged".[28] Accordingly, Defendants' motion for summary judgment is GRANTED. Judgment will be entered by a separate document.

DONE this 27th day of October, 1992.

/s/ Alex T. Harcourt, Jr.
CHIEF UNITED STATES
DISTRICT JUDGE

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[27] *Harte-Hanks, supra,* 491 U.S. at 666. *See also Zerangue v. TSP Newspapers, Inc.,* 814 F.2d 1066 (5th Cir. 1987).

[28] *Harte-Hanks, supra,* 491 U.S. at 686 (quotations and citations omitted).